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July 28, 2016

VIA E-MAIL AND HAND DELIVERY

Mr. Paul Braun
Ohio EPA Division of Air Pollution Control
P.O. Box 1049
Columbus, OH 43216-1049

**RE: Early Stakeholder Outreach --
Startup, Shutdown or Malfunction and
Scheduled Maintenance Rules**

Dear Paul:

Attached please find the Early Stakeholder Input Comments of The Ohio Chemistry Technology Council, The Ohio Chamber of Commerce, and The Ohio Manufacturers' Association regarding Ohio EPA's rulemaking in response to U.S. EPA's finding of "substantial inadequacy" and SIP Call to amend provisions applying to excess emissions during SSM periods (80 Fed. Reg. 33,840 (June 12, 2015)).

Please direct to the undersigned counsel any questions regarding the attached comments.

Very truly yours,

Robert L. Brubaker

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Eric B. Gallon

Eric B. Gallon

Counsel for The Ohio Chemistry Technology Council and
The Ohio Chamber of Commerce

Frank L. Merrill, per auth. by ELO

Frank L. Merrill

Environmental Counsel for The Ohio Manufacturers' Association

cc: Bob Hodanbosi
Mike Hopkins
Jennifer VanVlerah
Drew Bergman

**Comments of
The Ohio Chemistry Technology Council,
The Ohio Chamber of Commerce,
and
The Ohio Manufacturers' Association**

**In response to Ohio EPA's solicitation of Early Stakeholder Input
for Ohio EPA's response to U.S. EPA's SSM SIP Call**

July 28, 2016

I. Introduction

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, and the Ohio Manufacturers' Association (the "Commenters") respectfully submit the following recommendations in response to Ohio EPA's invitation for Early Stakeholder Input on potential amendments to Ohio's startup, shutdown, and malfunction (SSM) rules in response to U.S. EPA's finding of "substantial inadequacy" and SIP Call to amend provisions applying to excess emissions during SSM periods (80 Fed. Reg. 33,840 (June 12, 2015)).

The Ohio Chemistry Technology Council represents the interests of over 80 chemistry industry-related companies that do business in Ohio. The Ohio Chamber of Commerce represents the interests of over 6,000 member companies, including manufacturers, utilities, and small businesses, in addition to hosting the Ohio Small Business Council. The Ohio Manufacturers' Association represents the interests of over 1,400 member companies to protect and grow Ohio manufacturing. The Commenters are subject to regulation by Ohio's Clean Air Act State Implementation Plan (SIP) and have a direct and substantial interest in the Ohio SIP's SSM provisions.

II. Preliminary Observations on U.S. EPA's SSM SIP Call

As an initial matter, we note that U.S. EPA's SSM SIP Call is arbitrary and unlawful. Ohio EPA and others are rightfully challenging the SSM SIP Call's facial invalidity before the D.C. Circuit. Any challenges to the SSM SIP Call as specifically applied to Ohio must await potential appeals to the Sixth Circuit after final action by U.S. EPA specific to Ohio in response to the SIP Call. Ohio should respond to the SIP Call in a manner that does not undermine Ohio's recourse to judicial review of U.S. EPA's actions. Ohio should also try to minimize the harm and disruption resulting from U.S. EPA's improvident action.

The Commenters submitted comments in opposition to U.S. EPA's Proposed SSM SIP Call in May 2013. Those comments, which we incorporate here (and attach hereto), place the SIP Call in useful context. Although we understand that the current rulemaking necessarily assumes the SSM SIP Call's legality (unless and until the D.C. Circuit rules otherwise), it is worthwhile to reemphasize a few fundamental facts and principles:

- U.S. EPA approved each of the Ohio SIP provisions in question, in some cases repeatedly and recently.
- There has been no change in facts or law that justifies reversing U.S. EPA's prior final approval actions.
- Ohio's existing SIP, with its current SSM provisions, has successfully attained and maintained the NAAQS.
- U.S. EPA's new interpretation of "emission limitation" is fundamentally misguided. Congress's addition in 1977 of the phrase "on a continuous basis" to the definition of "emission limitation" in Clean Air Act §302(k) was meant to disallow intermittent control systems, not to foreclose SSM provisions that existed in virtually all SIPs and in the federal New Source Performance Standard program at that time. In its D.C. Circuit brief in defense of the Clean Power Plan, U.S. EPA acknowledged this reading of §302(k) and Congress's intent of Congress. See U.S. EPA's March 28, 2016 Initial Brief in *State of West Virginia v. EPA*, No. 15-1363, at p. 67.
- The SSM SIP Call unlawfully attempts to overrule the States' primary responsibility for air pollution prevention and control at its source, in conflict with the bedrock premise in the first section of the Clean Air Act.
- Ohio EPA should take no action that would either undermine the relief being sought in the pending D.C. Circuit appeals of the SSM SIP Call or impair the relief available from the Sixth Circuit once petitioners seek judicial review of the SSM SIP Call as applied to Ohio.

III. General Principles for Ohio EPA's Response to the SSM SIP Call

Putting aside the legal invalidity of the SSM SIP Call, the Commenters respectfully submit that Ohio EPA should apply the following basic principles when revising the agency's rules in response to the SSM SIP Call:

1. Ohio EPA should not make malfunction reporting contingent upon a legal conclusion or an admission that the reporting source has "violated" applicable law.
2. Ohio's response to the SSM SIP Call should not make existing SIP compliance obligations more stringent and should not impose any new infeasible or unduly stringent compliance obligations. At a minimum, any prejudicial or unwarranted rule changes in response to the SSM SIP Call should take effect only upon full approval by U.S. EPA. Moreover, those rule changes should cease to be effective if any court, future Congress, or future U.S. EPA negates the SSM SIP Call's requirements.
3. SIP requirements applicable during SSM conditions should never compromise or take precedence over safety.
4. The provisions in OAC 3745-15-06(A) for scheduled maintenance of air pollution control equipment reflect sound environmental policy. The types of infrequent and brief scheduled maintenance activities that the current rule authorizes are environmentally beneficial. They are necessary and appropriate for maintaining and improving the effectiveness of air pollution control equipment. In many cases, they result in fewer emissions than shutting down and restarting in order to do such

maintenance. And in some cases, the maintenance is needed to avert significant safety risks. Accordingly, Ohio EPA should not and cannot discard those provisions entirely.

Instead, Ohio EPA can resolve U.S. EPA's stated objections to those provisions by simply converting the existing criteria for approving scheduled maintenance into mandatory work practices. Work practices meet the definition of "emission limitation" in Clean Air Act §302(k) and are consistent with the States' option for "other control measures" (in addition to "emission limitations") in Clean Air Act § 110(a)(2)(A).

Similarly, and for the same reasons, Ohio EPA can resolve U.S. EPA's objections to the criteria in OAC 3745-15-06(C) governing the Director's exercise of discretion in response to malfunction events by simply converting those criteria into mandatory work practices. But where an applicable New Source Performance Standard or NESHAP already provides work practice or performance standards for malfunction events, the rule should provide the option to follow those federal standards.

5. For numerous reasons, U.S. EPA's objections to OAC 3745-17-07(A)(3)(c) and 3745-17-07(B)(11)(f) (which exclude SSM periods from the opacity provisions applicable to normal source operations) have no rational basis. U.S. EPA's New Source Performance Standards have contained the same exclusions since 1971. Ohio has successfully attained and maintained the NAAQS for PM with these exclusions in place. There is no correlation between the level of opacity from an individual stack and the concentration of regulated particulate matter in the ambient air. There is no ambient air quality standard for opacity. And opacity is not a regulated air pollutant. For all of these reasons, there is no justification for changing the Ohio SIP's SSM exclusion from opacity standards. Moreover, any such change would require a demonstration of compliance with the criteria set forth in Clean Air Act §110 and R.C. 3704.03(E) and (D). In the absence of any such demonstration, Ohio EPA should make no changes to OAC 3745-17-07(A)(3)(c) or 3745-17(B)(11)(f).
6. Rule changes in response to U.S. EPA's SSM SIP Call must fully comply with Executive Order 2011-01K and the directives of the Common Sense Initiative Office. In particular, the Agency must "choose the regulation that accomplishes the regulatory objective and is least burdensome on small businesses." The Agency must also identify the nature and cost of the adverse impacts of its rulemaking, and quantify the expected adverse impacts of its rule changes (including employer time required for compliance and increased exposure to fines).
7. Ohio EPA should take the opportunity provided by the SSM SIP Call to streamline the existing rules and remove ambiguous, undefined, redundant, and unnecessary language.

IV. Specific Rule Text Suggestions for Responding to the SSM SIP Call

Given the principles outlined above, the Commenters respectfully recommend that Ohio EPA's next draft rule changes in response to the SSM SIP Call include the following revisions to the existing rules in question (the recommended changes are highlighted in track change):

3745-15-01 Definitions.

(P) "Malfunction" means a sudden, infrequent, and not reasonably preventable failure of a source or related air pollution control equipment to operate in a manner that results, or in the judgment of the operator may result, in a level of mass emissions greater than those permitted during normal operations or otherwise authorized by a permit.

3745-15-06 Malfunction of equipment; scheduled maintenance; reporting.

(A) Scheduled maintenance of air pollution control equipment shall be conducted according to the following work practice and notification requirements:

(1) For the purposes of this rule, maintenance of air pollution control equipment which is scheduled to prevent a malfunction ~~which that~~ would occur within two weeks if the maintenance were not performed shall be considered ~~to be~~ a malfunction and shall be subject to the provisions of paragraph (B) of this rule.

(2) Except as otherwise indicated in ~~paragraph paragraphs (A)(3) and (A)(5)~~ of this rule, scheduled maintenance of air pollution control equipment, ~~that requires the shutdown shutting down or bypassing of said the equipment,~~ must be accompanied by the shutdown of the associated air pollution source or sources.

(3) In cases where a complete source shutdown may result in damage to the air pollution source or sources or is otherwise impossible or impractical, the owner or operator ~~may request authorization to continue operating the sources during the scheduled maintenance of air pollution control equipment. Any such request shall be made in a written report shall notify the Director at least two weeks prior to the planned shutdown of the air pollution control equipment. The director shall authorize the shutdown of the air pollution control equipment if, in his judgment, the situation justifies continued operation of the sources. Any written report submitted pursuant to this paragraph notification shall contain the following information:~~

(a) ~~Identification~~ The identification (including the Ohio environmental protection agency permit application number) and location of the specific associated source or sources for which air pollution control equipment will be taken out of service. The identification shall include the Ohio environmental protection agency permit application number.

(b) The expected length of time ~~that~~ the air pollution control equipment will be taken out of service.

(c) The nature and estimated quantity of emissions of air contaminants which are regulated air pollutants likely to occur during the shutdown period from all emission units at the facility during scheduled maintenance, compared to the maximum authorized

emissions of the same air pollutants from all emission units at the facility during normal operations.

- (d) Measures, such as the use of off-shift labor and equipment, that will be taken to minimize the length of the shutdown period.
- (e) The reasons that why it will be impossible or impractical to shut down the source operation during the scheduled maintenance period.
- (f) A demonstration that all feasible. A description of interim control measures will that will be taken to reduce emissions from the source during the scheduled maintenance.

(4) The director shall post the receipt of the scheduled maintenance notification described in paragraph (A)(3) of this rule on the Ohio EPA website.

(5) In cases where a complete source shutdown during the scheduled maintenance of air pollution control equipment may result in damage to the source or sources or is otherwise impossible or impractical, the owner or operator shall comply with the following work practices:

(a) All practicable measures shall be taken to minimize the duration of the shutdown period.

(b) All feasible interim control measures shall be taken to reduce emissions from the source during the shutdown period.

(B) Malfunctions of air pollution control equipment shall be responded to and reported as follows:

(1) In the event that any emission of a malfunction, the owner or operator of the source, or related air pollution control equipment, or related facility breaks down in such a manner as to cause the emission of air contaminants in violation of any applicable law, the person responsible for such equipment shall immediately that experienced the malfunction shall notify the Ohio environmental protection agency district office or delegate agency of such failure or breakdown as soon as practicable by telephone or electronic mail. If the malfunction continues for more than seventy-two twenty-four hours, the source owner or operator shall provide a written statement to the director within two weeks of after the date the malfunction occurred. The immediate director may extend the deadline for providing the written statement for good cause. The initial notification and written statement shall include the following data, to the extent the data is available:

(a) Identification and location of such equipment. The identification (including the Ohio environmental protection agency permit application number-) and location for each air contaminant source.

(b) The estimated or actual duration of breakdown the malfunction.

(c) The nature and estimated quantity of air contaminants which have been or may be emitted into the ambient air emissions during the breakdown period malfunction.

(d) Statements demonstrating the following:

(i) Shutdown or reduction of source operation during the breakdown period will be or (d) If the source did not initiate shut-down within one hour after the malfunction was detected, the

reasons why it would have been impossible or impractical to shut down the source during or after the malfunction.

(2) Except as otherwise authorized in paragraph (B)(3) of this rule, the owner or operator shall implement the following work practices during the malfunction:

(ii) The estimated breakdown period will be or was reasonable (a) The malfunction shall be minimized in duration based on to the extent practicable, taking into consideration good safety practices; installation or repair time; delivery dates of equipment, replacement parts, or materials; or; and current unavailability of essential equipment, parts, or materials.

(ii)b) Available alternative operating procedures and interim control measures will be or have been shall be implemented during the breakdown period malfunction to reduce adverse effects on public health or welfare.

(ivc) All actions necessary and required by any applicable preventive maintenance and malfunction abatement plan will be or have been shall be implemented.

(3) Sources within a source category for which work practice or performance standards have been established pursuant to 40 CFR Parts 60, 61, 62, or 63 for malfunction events may elect to implement those work practices or performance standards in lieu of paragraph (2) of this rule.

(2)(4) The owner or operator shall notify the Ohio environmental protection agency district office or delegate agency shall be notified when the condition causing the failure or breakdown malfunction has been corrected and the equipment is again in operation. Notification of the correction of the condition causing the failure or breakdown This notification may be given verbally if the duration of the malfunction is seventy-two twenty-four hours or less. Otherwise, such notification shall be in writing.

(3)(5) Within two months following a failure or breakdown malfunction which exceeded seventy-two twenty-four hours in duration, the owner or operator of such equipment shall prepare and submit a detailed report which that identifies a program to prevent, detect, and correct, as expeditiously as practicable, similar future failures or breakdowns of such malfunctions of the source or related air pollution control equipment.

(C) The director retains the responsibility to evaluate any report submitted pursuant to this rule. The director shall take appropriate action upon a determination that the shall evaluate each initial notification and written report that is filed and any other relevant information and may take appropriate action, based on the magnitude and duration of the emissions as a result of the malfunction, if it is determined that this rule's work practice standards or reporting requirements of this rule have not been satisfied, that the source or associated air pollution control equipment was not properly operated and maintained prior to breakdown, that shutdown of the source or operation during the period of maintenance or breakdown was or has become practicable, that the shutdown or breakdown was or has become avoidable, or the malfunction, that shutting down the source during the malfunction was initially or subsequently became practicable, that the malfunction was avoidable, that the malfunction was induced or prolonged in bad faith, or that the excess emissions endanger during the malfunction endangered or tend to endanger the health or safety of the public.

(D) The initial notification and written report required by this rule do not constitute an admission of a violation of any applicable law. Any malfunction that is determined to be a deviation from an

applicable permit term and condition shall be properly reported under paragraph (D) of rule 3745-15-03 or Chapter 3745-77 of the Administrative Code.

~~(E) If, in the director's judgment of the director, any source or air pollution control equipment has had excessive or unduly prolonged malfunctions of any emission source, air pollution control equipment or related facility have occurred, the director may require the owner or operator of said that source, or equipment or related facility to prepare, submit, and implement a preventive maintenance and malfunction abatement plan which is acceptable to the director. Such The plan shall be designed to prevent, detect, and correct malfunctions or equipment failures which that could result in emissions exceeding any applicable law malfunctions.~~

(1) Each preventive maintenance and malfunction abatement plan shall be in writing and specify the following:

(a) A comprehensive preventive maintenance program, including a description of the items or conditions that will be inspected, the frequency of these inspections ~~or~~ and repairs, and an identification of the types and quantities of the replacement parts ~~which that~~ will be maintained in inventory for quick replacement.

(b) An identification of the source and the operating outlet variables of the air pollution control equipment that will be monitored in order to detect a malfunction or failure, ~~and~~ the normal operating range of these variables, ~~and a description of the~~.

(c) ~~The~~ monitoring or surveillance procedures and ~~of~~ the method of informing operating personnel of any malfunction, including alarm systems, lights or other indicators.

(ed) ~~A description of the~~ The corrective procedures that will be taken in the event of a malfunction ~~or failure in order to achieve compliance with any applicable law return to normal operations~~ as expeditiously as practicable.

(2) ~~Any acceptable~~ If the director finds the preventive maintenance and malfunction abatement plan acceptable, that plan shall be specified in the terms and conditions of any permit or variance issued for a source covered by such plan. If the director does not find the preventive maintenance and malfunction abatement plan acceptable, the owner or operator shall revise and resubmit the plan.

(3) ~~Operation~~ The source owner or operator shall maintain operation and maintenance records shall be maintained by the owner or operator of the source to demonstrate that any preventive maintenance and malfunction abatement plan is fully implemented. All such records shall be maintained for a minimum of two years and shall be subject to inspection by the director or his representative upon request.

(E) During routine maintenance of add-on pollution controls, an owner or operator of a glass melting furnace is deemed in compliance with applicable air pollution control requirements if:

(1) Routine maintenance in each calendar year does not exceed 6 days.

(2) Routine maintenance is conducted in a manner consistent with good air pollution control practices.

(3) A report is submitted to the director ten days before the start of the routine maintenance (or, if ten days is impracticable, as soon as practicable) explaining the maintenance schedule.

(F) During malfunction events, a coke oven battery shall be subject to the work practice standards set forth at 40 CFR 63.310.

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May 13, 2013

U.S. Environmental Protection Agency
EPA West (Air Docket),
1200 Pennsylvania Ave. NW.
Mail Code: 6102T
Washington, DC 20460

RE: *State Implementation Plans: Response to Petition
for Rulemaking; Findings of Substantial
Inadequacy; and SIP Calls To Amend Provisions
Applying to Excess Emissions During Periods of
Startup, Shutdown, and Malfunction*
Docket ID No. EPA-HQ-OAR-2012-0322

To Whom It May Concern:

Attached please find the Comments of The Ohio Chemistry Technology Council, The Ohio Chamber of Commerce, and The Ohio Manufacturers' Association on U.S. EPA's Proposed Response to Petition for Rulemaking, Findings of Substantial Inadequacy, and SIP Calls to Amend Provision Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 Fed. Reg. 12460 (Feb. 22, 2013).

Please direct to the undersigned counsel any questions regarding the attached comments.

Very truly yours,

*Robert L. Brubaker
Eric B. Gallon*

Counsel for The Ohio Chemistry Technology Council and The Ohio Chamber of Commerce

Frank L. Merrill

Environmental Counsel for The Ohio Manufacturers' Association

RLB/ebg
Attachment

**Comments of
The Ohio Chemistry Technology Council,
The Ohio Chamber of Commerce,
and
The Ohio Manufacturers' Association
on U.S. EPA's Proposed Response to Petition for Rulemaking, Findings of
Substantial Inadequacy, and SIP Calls to Amend Provision Applying to
Excess Emissions During Periods of Startup, Shutdown, and Malfunction,
78 Fed. Reg. 12460 (Feb. 22, 2013)**

May 13, 2013

The Commenters

The Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, and the Ohio Manufacturers' Association (the "Commenters") submit the following comments in response to U.S. EPA's notice of proposed rulemaking published at 78 Fed. Reg. 12460 et seq. on February 22, 2013, concerning the Agency's proposed response to a petition for rulemaking filed by the Sierra Club, proposed findings of substantial inadequacy of State implementation plans (including Ohio's), proposed SIP Call to amend certain startup, shutdown, and malfunction provisions in State implementation plans (including Ohio's), and revisions to the Agency's policy on startup, shutdown, and malfunction (SSM).

The Ohio Chemistry Technology Council represents the interests of over 80 chemistry industry and related companies that do business in Ohio. The Ohio Chamber of Commerce represents the interests of over 6000 member companies, including manufacturers, utilities, and small businesses, in addition to hosting the Ohio Small Business Council. The Ohio Manufacturers' Association represents the interests of over 1400 member companies to protect and grow Ohio manufacturing. The Commenters' member companies are subject to regulation by the Ohio State Implementation Plan (SIP), and have a direct and substantial interest in the SSM provisions in Ohio's SIP.

U.S. EPA's proposed SIP Call for Ohio is based on a substantial misreading of the SIP provisions that U.S. EPA proposes to find "substantially inadequate." Indeed, the SIP Call and U.S. EPA's proposed changes to its SSM policy are based on a mistaken and unnecessarily cramped reading of the Clean Air Act itself, particularly the meaning of "continuous" in the definition of "emission limitation" and the meaning of "substantially inadequate." And, U.S. EPA's proposal to prune the SSM provisions that are integrally intertwined with other compliance obligations in the Ohio SIP will inevitably lead to absurd results. For all of these reasons, as further explained in these comments, the Commenters respectfully request that U.S. EPA withdraw and reconsider its February 22, 2013 proposed actions with respect to the approved startup, shutdown, and malfunction provisions in the Ohio SIP.

Introduction

On February 22, 2013, U.S. EPA published a proposed rule pertaining to State Implementation Plan ("SIP") provisions that provide exemptions for excess emissions during periods of startup, shutdown, and malfunction ("SSM"). *See* 78 Fed. Reg. 12460. U.S. EPA issued the proposed rulemaking in response to a petition from the Sierra Club, as required by a settlement agreement U.S. EPA executed with Sierra Club in November 2011. The Sierra Club's petition for rulemaking was not supported by any change in facts or law subsequent to EPA's approval of the Ohio SIP provisions now challenged by the Sierra Club. Nor was it supported by any facts at all. Instead, it was a transparent attempt to misuse a petition for rulemaking to circumvent the statutory requirement in CAA § 307(b)(1) that a petition for review of the Administrator's action in approving an implementation plan under CAA § 110 be filed in the appropriate circuit within sixty days from the date notice of such approval appeared in the Federal Register (except for petitions based solely on grounds arising after such sixtieth day, which Sierra Club's petition clearly is not). Sierra Club's petition is untimely by some three decades in the case of some of the Ohio SIP provisions in question. The wasteful public expense and regulatory disruption it would impose are unconscionable in view of the Sierra Club's laches.

Despite this, U.S. EPA has proposed to grant the Sierra Club's petition in part and "revise its SSM Policy to reflect its interpretation of the CAA that affirmative defense provisions applicable during startup and shutdown are not appropriate." *Id.* at 12471. EPA also expressed concern with state SIP provisions that provide "discretionary exemptions via director's discretion" and "ambiguous enforcement discretion provisions that may be read to preclude EPA or citizen enforcement[.]" *Id.* at 12474. Accordingly, EPA proposed "to issue a SIP call for SIP provisions identified in the Petition that provide an affirmative defense for excess emissions during planned events, such as startup and shutdown," and "'director's discretion' provisions in SIPs if they provide unbounded discretion." *Id.* at 12471, 12474.

With regard to Ohio's SIP, U.S. EPA proposes to find "substantially inadequate" the malfunction accountability provisions in OAC 3745-15-06(A)(3) (relating to scheduled maintenance of air pollution control equipment where a complete source shutdown may result in damage to the source or is otherwise impossible or impractical) and the additional limitations on the applicability of OAC 3745-15-06(A) set forth in OAC 3745-15-06(C). The provisions of OAC 3745-15-05(A)(3) and 15-06(C) were approved by EPA on October 1, 1982. *See* 47 Fed. Reg. 43375. U.S. EPA also proposes to find "substantially inadequate" the fact that the opacity standards in OAC 3745-17-07(A)(1) and 17-07(B)(1) to (B)(9) were never made applicable to periods of properly reported and demonstrated malfunction of air pollution control equipment or of an air contaminant source, per OAC 3745-17-07(A)(3)(c) and 17-07(B)(11)(f). *See* 78 Fed. Reg. at 12518-9. U.S. EPA approved the provisions of OAC 3745-17-07(A)(3)(c) and (B)(11)(f) on May 27, 1994. *See* 59 Fed. Reg. 27464. Finally, U.S. EPA proposes to find "substantially inadequate" the NO_x emission limitations applicable to Portland cement plants, imposed under the NO_x SIP Call, in OAC 3745-14-11(D), which by their terms were never made applicable to start-up and shutdown periods and periods of malfunction that do not exceed thirty-six consecutive

hours or regularly scheduled maintenance activities. See 78 Fed. Reg. at 12519. This provision mirrors exactly U.S. EPA's model SIP rule for cement manufacturing. See 63 Fed. Reg. 56394, 56427 (Oct. 21, 1998), and *Michigan v. EPA*, 213 F. 3d 663 (D.C. Cir. 2000). U.S. EPA approved OAC 3745-14-11(D) on August 5, 2003. See 68 Fed. Reg. 46089.

U.S. EPA bases its proposed SIP Call on the purported authority of CAA § 110(k)(5). See 78 Fed. Reg. at 12483. Section 110(k)(5) of the Clean Air Act, 42 U.S.C. § 7410(k)(5), states in relevant part that the Administrator of the U.S. EPA shall require a State to revise its implementation plan if the plan is "substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter" In this action, U.S. EPA relies on the portion of § 110(k)(5) authorizing a SIP Call if an implementation plan is "substantially inadequate to ... comply with any requirement of this chapter" (See 78 Fed. Reg. at 12483.) In particular, U.S. EPA concludes that the three provisions of the Ohio SIP listed above are "substantially inadequate" to comply with "the requirements of CAA section 110(a)(2)(A) [and 110(a)(2)(C) that] SIPs must contain emission limitations and, in accordance with the definition of 'emission limitations' in CAA section 302(k), such emission limitations must be continuous." See 78 Fed. Reg. at 12519; see also *id.* at 12485.

U.S. EPA misreads the Ohio SIP provisions it proposes to find "substantially inadequate"

U.S. EPA has misread the provisions in the Ohio Administrative Code that it proposes to find "substantially inadequate." OAC 3745-15-06(A)(3) does not, as EPA claims in its notice of proposed rulemaking, provide "unbounded director's discretion." 78 Fed. Reg. at 12519, 12520. Rather, the rule provides a narrowly defined set of circumstances under which the director must allow continued operation of an air contaminant source during maintenance of air pollution control equipment. These provisions require strict accountability on the part of source owners and operators to report and justify continued operation, and establish reasonable and objective criteria for the director to either authorize continued source operation during such maintenance or withhold such authorization and pursue appropriate enforcement action. OAC 3745-15-06(C), moreover, requires the director to "take appropriate action upon a determination that the reporting requirements of this rule have not been satisfied, that the equipment was not properly operated and maintained prior to breakdown, the shutdown of the source or operation during the period of maintenance or breakdown was or has become practicable, that the shutdown or breakdown was or has become avoidable, or was induced or prolonged in bad faith, or that the emissions endanger or tend to endanger the health or safety of the public." U.S. EPA acknowledged this when it approved OAC 3745-15-06(A)(3) and (C) in October 1982. At that time, EPA said:

EPA believes this provision [OAC 3745-15-06(C)] is not inconsistent with EPA's malfunction policy. EPA's basic criterion in reviewing the malfunction rules is that the rules must not provide for an automatic exemption during a maintenance/malfunction episode. EPA does not interpret paragraph (C) or any paragraph of rule 3745-15-06 as providing a source with an automatic opportunity to violate any mass or visible emission limitation due to a maintenance/malfunction occurrence. ... Rule 3745-15-06 permits the Director to exercise enforcement discretion on a case-by-case basis depending on the circumstances surrounding the malfunction. ... In all cases, the Director must carefully scrutinize the source's claim for an exemption.

47 Fed. Reg. at 43377.

OAC 3745-15-06(A)(3) and (C) also do not give Ohio EPA's director "unbounded ... discretion" to "exempt" sources from "otherwise applicable" compliance requirements. 78 Fed. Reg. at 12519, 12520 (emphasis added). These rules do not "authorize air agency personnel to *modify* existing SIP requirements under certain conditions." *Id.* at 12485 (emphasis added). Rather, OAC 3745-15-06(A)(3) imposes a different, applicable emission limitation or control measure *that is also in the SIP* – the requirement to undertake "all feasible interim control measures." OAC 3745-15-06(A)(3).

Nor do OAC 3745-17-07(A)(3)(c) and (B)(11)(f) provide automatic exemptions from any SIP emission limitations. OAC 3745-17-07(A)(3)(c) makes the visible particulate emission limitations established in paragraph (A)(1) of OAC 3745-17-07 inapplicable to the startup and shutdown of fuel burning equipment or to the malfunction of any air contaminant source or the malfunction/shutdown of air pollution control equipment associated with an air contaminant source, if the owner or operator complies with the requirements of OAC 3745-15-06 and none of the conditions listed in OAC 3745-15-06(C) exist. This rule and OAC 3745-07(B)(11)(f) apply to opacity standards that were developed to implement the total suspended particulate matter National Ambient Air Quality Standards (NAAQS) repealed by U.S. EPA in 1987. Opacity was never correlated with particulate matter NAAQS attainment or nonattainment, but rather serves as a convenient and cost-effective indicator of proper operation and maintenance of particulate control equipment such as electrostatic precipitators and baghouses. Opacity is not a criteria pollutant, and is not in and of itself a criteria pollutant emission limitation. And, the malfunction exceptions to opacity requirements for fuel burning sources in OAC 3745-17-07(A)(3)(c) and fugitive dust sources in OAC 3745-17-07(B)(11)(f) are not automatic exemptions either. Instead, they are subject to the owner/operator's duty to report and to the Director's duty to review against the criteria in OAC 3745-15-06(C), consistent with the U.S. EPA malfunction policy at the time they were approved by U.S. EPA.

U.S. EPA's current description of these provisions as "unbounded director's discretion provisions that make a state official the unilateral arbiter" (78 Fed. Reg. at 12519) also is inconsistent with U.S. EPA's own prior description of the regulations when it approved them. At that time, U.S. EPA said:

[W]ith regard to the above exemptions, U.S. EPA will treat the submission of any incomplete or erroneous information by a source as a violation of this regulation, and will not allow an exemption supported by such information. U.S. EPA's action does not constitute advance approval of any exemptions which may be claimed or issued under Ohio's regulations. Thus, U.S. EPA may take independent enforcement action to the extent allowed by sections 113 and any other applicable provisions of the CAA, notwithstanding the issuance of an exemption by the State.

59 Fed. Reg. at 27465-66. U.S. EPA states now that "[t]he state official's grant of permission to continue to operate during the period of maintenance could be interpreted ... to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation." 78 Fed. Reg. at 12519. But U.S. EPA rejected that interpretation of those provisions. Without conceding the legal effect of U.S. EPA's preamble statement, it has been U.S. EPA's interpretation for twenty years that in the event Ohio EPA does not apply its malfunction accountability provisions "strictly," as Ohio EPA directed in 1994 (*see* 59 Fed. Reg. at 27465), U.S. EPA retains its enforcement rights.

**Ohio's SSM Exceptions In the NOx RACT Rules for Portland Cement Kilns
Are Not "Substantially Inadequate" Because Those Rules Need Not Be
Applied "On a Continuous Basis"**

U.S. EPA's proposed findings also misinterpret the Clean Air Act. Implicit in U.S. EPA's finding of substantial inadequacy are three erroneous premises: first, that a SIP provision restricting the operation of, or emissions from, a source must be an "emission limitation" to be lawful; second, that a source must be subject to the same emission limitation during all periods of time for emission reduction to be "continuous"; and three, that the "continuous basis" requirement applies to all types of "emission limitations." These premises are not supported by the text of the Act. Section 110 of the Act states, in relevant part:

- (2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—
 - (A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter; ...

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter ...

CAA § 110(a)(2)(A), (C). "Emission limitation" is then defined to mean:

a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter..

CAA § 302(k).

Nowhere in these provisions of the Act does it state that SIPs are required to "contain [only] 'emission limitations' to meet CAA requirements." Instead, it plainly says that SIPs must "include enforceable emission limitations *and other control measures, means, or techniques ...* ." CAA § 110(a)(2)(A) (emphasis added) U.S. EPA's position overlooks Congress's instruction that U.S. EPA must allow States to use other measures as they deem necessary or appropriate, in conjunction with emission limitations, to assure achievement of the NAAQS and meet other applicable requirements of the Act. Moreover, the definition of "emission limitation" includes "any design, equipment, work practice or operational standard promulgated under this chapter," which types of requirements are not subject to the "continuous emission reduction" attribute.

U.S. EPA also overlooks the fact the exclusion in OAC 3745-14-11(D) of periods of startup, shutdown, and malfunction from the control technology requirements in OAC 3745-14-11, one of the three Ohio SIP provisions U.S. EPA proposes to find "substantially inadequate," does not apply to an "emission limitation." OAC 3745-14-11(D) requires certain specified types of Portland cement kilns to "install[] and operate[] ... low-NOx burners, mid-kiln system firing, or [equivalent, approved] alternative control techniques" between May and September of each year, except during SSM periods (up to 36 consecutive hours) or "regularly scheduled maintenance activities." OAC 3745-14-11(D). U.S. EPA agreed that a similar provision in its proposed Federal Implementation Plan for the NOx SIP Call was not an "emission limit." 63 Fed. Reg. at 56417. Instead, it is a control technology requirement. Under the NOx SIP Call, U.S. EPA required "highly cost-effective" technology-based controls on sources in Ohio and other states. *Michigan v. EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000). And, this was explicitly permitted by CAA § 110(a)(2)(A), which allows SIPs to include "emission limitations *and other control measures, means, or techniques ...* as may be necessary or appropriate to meet the applicable requirements of this chapter[.]" CAA § 110(a)(2)(A). It also is a "design standard" within the section 302(k)

definition of "emission limitation" that is not subject to the "continuous emission reduction" element in any event.

Thus, even under U.S. EPA's logic, Ohio's NOx RACT rules would not be required to impose "continuous" emission reduction requirements. The requirement that Portland cement kilns install low-NOx burners or alternative controls is either or both: 1) a "design standard" that is an "emission limitation" not subject to the "continuous basis" clause; and/or 2) not an "emission limitation," so that requirement need not be applied "on a continuous basis." Instead, as technology-based control requirements, the provisions in OAC 3745-14-11 are subject to the principle that "technology-based standards should account for the practical realities of technology," as recognized by U.S. EPA in this rulemaking. 78 Fed. Reg. at 12470. Under a plain reading of CAA § 110, the SSM exemptions in Ohio's NOx RACT rules for Portland cement kilns are permissible, and OAC 3745-14-11(D) is not substantially inadequate to meet CAA requirements.

Ohio EPA's Malfunction Accountability Provisions Impose Emission Reduction Requirements "On a Continuous Basis" and Other Control Measures Consistent with Section 110(a)(2)(A)

U.S. EPA misreads the relationship between the word "continuous" in CAA § 302(k) and the requirements for SIPs in CAA § 110(a)(2). Under § 110(a)(2)(A) of the Clean Air Act, State plans for attainment and maintenance of the NAAQS may supplement "emission limitations" that apply "continuously" (when by their terms they apply) with "other control measures, means, or techniques" that apply at other times. Such a mix of "emission limitations" and "other measures" as a State deems "necessary or appropriate to meet the applicable requirements of" the Clean Air Act is plainly permitted by § 110(a)(2). U.S. EPA's proposed action on the Sierra Club petition and proposed findings of "substantial inadequacy" and SIP call would displace "other control measures, means, or techniques" that Ohio EPA, with U.S. EPA's approval, has deemed necessary or appropriate to achieve the NAAQS and meet other applicable requirements of the Act.

More broadly, U.S. EPA's proposed rule misinterprets the word "continuous." Congress's intent in adopting the definition of "emission limitation" in § 302(k) was not to prohibit the adoption of SSM provisions. Instead, the legislative history makes clear that Congress's intention was to clarify that "intermittent" control measures were not acceptable under § 110. The House Interstate and Foreign Commerce Committee report reporting H.R. 6161 explained:

The amendments would ... affirm the decisions of four U.S. court of appeals cases that the act requires continuous emission reduction measures to be applied. Thus, intermittent control measures (to be applied only in case of adverse weather conditions), increasing stack heights, or other pollution dispersion techniques would not be permitted as final compliance strategies.

H.R. Rep. No. 95-924, at 6 (1977). The Senate Environment and Public Works Committee report preceding the 1977 CAA Amendments similarly explained that the Committee was offering a definition for "emission limitation" to make clear that "[i]ntermittent controls or dispersion techniques are unacceptable as a substitute for continuous control of pollutants under this act." S. Rep. No. 95-127, at 94 (1977). The Senate Committee explained that "intermittent control strategies," which "rel[y] on the polluter's ability to predict weather conditions and willingness to curtail production in response to those predictions[,] were "unenforceable by air pollution control agencies" and "[could] cause unacceptable disruptions in production and employment." *Id.* at 95. Based on the legislative history, the United States Court of Appeals for the Ninth Circuit concluded that "any control technique is continuous which does not operate on an intermittent basis." *Kamp v. Hernandez*, 752 F.2d 1444, 1453 (9th Cir. 1985). Ohio EPA's malfunction accountability provisions clearly do not turn any of the Ohio SIP's emissions limitations into intermittent, weather-dependent controls. And nowhere in the legislative history is there any indication whatsoever that the new definition of "emission limitation" was meant to prohibit startup, shutdown, or malfunction exclusions or exemptions.

Importantly, moreover, an emission limitation need not be "unchanging" to be "continuous." *Sierra Club v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008). In *Kamp*, the Ninth Circuit affirmed U.S. EPA's position that "the requirement of regulation on a continuous basis does not necessarily imply that the source always be subject to precisely the same limitation." *Kamp*, 752 F.2d at 1452. Instead, "an implementation plan operates continuously so long as some limitation on emissions, although not necessarily the same limitation, is always imposed on the ... source." *Id.* The United States Court of Appeals for the D.C. Circuit accepted that position as well in *Sierra Club*. See *Sierra Club*, 551 F.3d at 1021.

Here, Ohio EPA's malfunction accountability provisions are carefully drafted to ensure that "emissions limitations" and/or "other control measures" will apply to sources even during SSM periods. OAC 3745-15-06(A)(3) states that Ohio EPA's director may not authorize an air pollution source to continue operating during the scheduled maintenance of air pollution control equipment unless the source submits a written report demonstrating, *inter alia*, that "all feasible interim control measures will be taken to reduce emissions from the source during the shutdown period." OAC 3745-15-06(A)(3)(f). Moreover, the director is required to "take appropriate action upon a determination that the reporting requirements of [the] rule have not been satisfied" or that "the emissions [from the source] endanger or tend to endanger the health or safety of the public." OAC 3745-15-06(C). These same requirements apply to the malfunction exemption from visible particulate emission limitations for stack emissions and fugitive dust in OAC 3745-17-07(A)(3)(c) and (B)(11)(f). This requirement to implement "all feasible interim control measures" (OAC 3745-15-06(A)(3)(f)) is a "requirement relating to the operation or maintenance of a source to assure continuous emission reduction" and a "work practice or operational standard." Hence, it meets the definition of an "emission limitation." CAA § 302(k).

OAC 3745-15-06(A)(3) and 15-06(C), thus, do not provide "unbounded director's discretion" to "exempt" sources from "otherwise applicable" compliance requirements, as U.S. EPA mistakenly concludes. 78 Fed. Reg. at 12519. Instead, because a source that receives authority to continue operating during scheduled maintenance of air pollution control equipment, the malfunction of an air contaminant source, or the malfunction/shutdown of air pollution control equipment is still subject to "some limitation on emissions," those rules comply with CAA § 302(k). *Kamp*, 752 F.2d at 1452.

This conclusion is fully consistent with the D.C. Circuit's 2008 holding in *Sierra Club*. U.S. EPA's proposed rulemaking asserts that "[c]ourt decisions confirm that [the] requirement for continuous compliance [in CAA § 302(k)] prohibits exemptions for excess emissions during SSM events," citing, *inter alia*, *Sierra Club*, 551 F.3d at 1021. 78 Fed. Reg. at 12470 n.22. But *Sierra Club* did not hold that all SSM provisions in the Clean Air Act are invalid. Indeed, the D.C. Circuit *agreed* that "emissions reduction requirements [can] 'assure continuous emission reduction' [for purposes of CAA § 302(k)] without necessarily continuously applying a single standard." *Sierra Club*, 551 F.3d at 1027. Instead, the D.C. Circuit held that CAA §112 requires that a *MACT standard* apply continuously, and the general duty to minimize emissions in 40 CFR §60.11(d) is not a MACT standard. "When sections 112 and 302(k) are read together," the court held, "Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard." *Id.* at 1027. Senior Circuit Judge Randolph's dissent in *Sierra Club* confirms this, stating:

[T]he discussion of §302(k)'s continuous basis requirement does no work in the majority's legal analysis; without the "continuous basis" requirement, the majority would still hold that EPA's standards must be "section 112-compliant." The majority's point is not that EPA has failed to regulate emissions sources on a continuous basis. *See* Maj. Op. at 14 (stating that EPA need not continuously apply a uniform standard). It is instead that the 1994 rule's "general duty to minimize" does not meet the requirements of § 112(h).

Id. at 1030 n.3 (Randolph, J., dissenting).

Here, of course, CAA § 112 is inapplicable and irrelevant. The section of the Act at issue here, CAA § 110, explicitly allows states to use "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter[.]" CAA § 110(a)(2)(A) (emphasis added). And, regardless, the Ninth and D.C. Circuits agree that the "emission limitation" requirement of § 110 can be met by imposing different "emission limitations" at different times. The obligation to utilize "all feasible interim control measures" that Ohio's SIP imposes on sources using the malfunction accountability provisions is, itself, an "emission limitation" for purposes of CAA § 302(k). Accordingly, Ohio's malfunction accountability provisions are not substantially inadequate to comply with the requirements of CAA section 110(a)(2)(A).

The SSM Provisions in Ohio's SIP Are Not "Substantially Inadequate" Because They Do Not Render The SIP Inadequate to Attain or Maintain the NAAQS

U.S. EPA is trying to pack far too much into the meaning of the word "continuous" in the § 302(k) definition of "emission limitation," and would read out of § 110(a)(2)(A) the provision for "other control measures, means, or techniques" the State deems necessary or appropriate to meet the NAAQS and other applicable requirements of the Act. The word "continuous" does not provide an independent basis to find a SIP "substantially inadequate" to meet the requirements of § 110(a)(2)(A) even if the NAAQS are attained. If Congress in 1977 had meant for the word "continuous" in the definition of "emission limitation" to mandate emission limitations more stringent than necessary to achieve the NAAQS, such legislative intent would have overruled both of the decisions of the Supreme Court at the time interpreting § 110 of the Clean Air Act (*Train v. NRDC*, 421 U.S. 60 (1975) and *Union Electric Co. v. EPA*, 427 U.S. 246 (1976)). That would have been a bombshell that could not have gone unnoticed and completely undocumented anywhere in the legislative history.

"Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (citations omitted). The word "continuous" in section 110(k) does not, by itself, eliminate U.S. EPA's burden under section 110(k)(5) to produce reliable evidence that an approved SIP does not provide for timely attainment and maintenance of the NAAQS in order to make a finding that the SIP is "substantially inadequate" to meet the requirements of section 110(a)(2)(A). To justify a finding that a SIP is "substantially inadequate" to meet the requirements of section 110(a)(2), including the requirement to include in SIPs "enforceable emission limitations," U.S. EPA must demonstrate, at a minimum, that the SIP is inadequate to attain and maintain the NAAQS (for all unit/pollutant combinations given the sweeping breadth of the Agency's proposed actions).

U.S. EPA has also chosen an unnecessarily stringent definition of "substantially inadequate." "[T]he determination about whether [a] SIP is substantially inadequate [for purposes of CAA §110(k)(5)] is within the Administrator's discretion." *Ass'n of Irrigated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2012). U.S. EPA has acknowledged that "the term 'substantially inadequate' is not defined in the CAA" and, therefore, U.S. EPA has discretion to "interpret this provision reasonably." 78 Fed. Reg. at 12483. U.S. EPA has further asserted that "it is reasonable to interpret the term in light of the specific purposes for which the SIP provision at issue is required, and thus whether the provision meets the fundamental CAA requirements applicable to such a provision." *Id.* The purpose for the SIP provisions at issue here is, of course, the "implementation, maintenance, and enforcement" of the primary and secondary NAAQS in Ohio. CAA § 110(a). Thus, by U.S. EPA's own admission, whether Ohio's malfunction accountability provisions are "substantially inadequate" must be determined by reference to whether they interfere with attainment or maintenance of the NAAQS.

In the case of a SIP control strategy that is submitted by a State pursuant to CAA § 110(a)(2) and approved by U.S. EPA for the purpose of attaining and maintaining a NAAQS, like the emission limitations and their associated compliance test methods and the startup, shutdown, and malfunction provisions at issue here, U.S. EPA bears the burden of demonstrating that such approved SIP "emission limitations and other control measures, means, or techniques" are "substantially inadequate to attain or maintain the relevant national ambient air quality standard" in order for EPA to invoke its powers under CAA § 110(k)(5). U.S. EPA has made no attempt to do so here. Instead, U.S. EPA claims that it is sufficient to establish that a SIP provision "could" result in "interference with attainment and maintenance of the NAAQS." See U.S. EPA, Memorandum on "Statutory, Regulatory, and Policy Context for this Rulemaking," at 21 (Feb. 4, 2013). There is no factual support for this assumption.

The malfunction accountability provisions in OAC 3745-15-06(A)(3) and (C), and OAC 3745-17-07 (A)(3)(c) and (B)(9), are just one aspect of a comprehensive and intricate collection of compliance obligations that comprise the applicable Ohio SIP approved by U.S. EPA. These malfunction accountability provisions have been implemented for decades by the State authority responsible for creating and administering the compliance obligations in the Ohio SIP. These provisions have been incorporated in the thousands of Title V and non-Title V operating permits, and major and minor NSR preconstruction permits issued by Ohio EPA. These provisions do not allow, by their express terms, emissions that would "endanger or tend to endanger the health or safety of the public," which includes emissions that would cause nonattainment of the NAAQS. The malfunction accountability provisions are integrally intertwined with other compliance obligations in the Ohio SIP.

The mandated criteria pollutant emission control requirements in the Ohio SIP are more stringent than necessary to attain and maintain the NAAQS. See CAA § 116; *Union Electric*, 427 U.S. at 265 (holding, "the States may submit implementation plans more stringent than federal law requires"). Ohio and other States applied multiple layers of conservatism in promulgating emission limitations to attain and maintain the NAAQS. For particulates, Ohio's SIP has a uniform, technology-based standard for most large boilers throughout the State, which is the same as U.S. EPA's "best demonstrated technology" New Source Performance Standards (NSPS) for large boilers in 40 C.F.R. Part 60, Subpart D (0.1 lb/MMBtu). Where air quality modeling was used to develop SIP emission limits, beginning in the late 1970s for SO₂, the dispersion algorithms and the input assumptions to the models were deliberately designed to exaggerate predicted concentrations. All sources were assumed to operate at their maximum potential emission rate constantly, 8,760 hours per year, and to do so simultaneously with all other inventoried sources, even though many emission sources don't operate at all for substantial periods of time. Background concentrations double counted impacts of modeled sources. The multiple layers of conservatism, or "overkill," in the Ohio SIP are recognized in cases such as *CEI v. Costle*, 572 F.2d 1150 (6th Cir. 1978), which rejected complaints that U.S. EPA's model for establishing SO₂ emission limitations, called "RAM," was too "conservative," and noted a "conservative approach in protection of health and life was apparently contemplated by Congress."

Another source of conservatism and "overkill" in the Ohio SIP is the expression of emission limits over time as a ratio of mass emissions to production variables, so that allowable mass emissions are less at low production levels than at high production levels. The emission limitations in the Ohio SIP are calculated to ensure attainment of the NAAQS even if all sources simultaneously and constantly operate at their maximum production and emission levels. However, most sources rarely operate at their maximum production levels, much less do all sources operate simultaneously and constantly at their maximum production levels. The emission control requirements in the Ohio SIP not only limit mass emissions at maximum production capacity, but also allow less mass emissions as production levels decrease. Ohio's SIP emission limitations are usually expressed as ratios of mass emission rates to production or uncontrolled mass emission rate variables, such as pounds per million Btu (*e.g.*, OAC 3745-17-10 and 3745-18-07 to -18-93), grains per dry standard cubic feet (3745-17-08), pounds per ton of raw material throughput process weight (*e.g.*, OAC 3745-17-11), percent reduction (*e.g.*, OAC 3745-21-07), or parts per million of exhaust gas volume (*e.g.*, OAC 3745-21-09). While the ratio of mass emissions to variable production levels or variable pre-control mass emission levels, such as percent reduction, or pounds per million Btu heat input, or pounds per unit of throughput or production, may go up during periods of startup, shutdown, or malfunction, the mass rate of emissions during such periods is typically, and often inherently, much lower than at maximum production capacity. There is no rational correlation between these emission limitations expressed as ratios and attainment vs. nonattainment of the NAAQS. Also, many emission sources don't operate at all for substantial periods of time (resulting in an environmental benefit that is not possible without startups and shutdowns).

In these and many other ways, the Ohio SIP mandates performance obligations that are more stringent than necessary to attain and maintain the NAAQS. This "overkill" must be taken into account, for each of the six criteria pollutants, in evaluating the air quality significance of the malfunction accountability provisions in the Ohio SIP. Given the overcontrol of criteria pollutant emissions required by the Ohio SIP, U.S. EPA cannot base a SIP call on the mere assumption, without proof and in the face of historical evidence to the contrary, that emissions during startup, shutdown, and malfunction events at a single source, or a small group of sources simultaneously in startup, shutdown, or malfunction mode, cause a violation of the NAAQS (for all relevant criteria pollutants). Also, the SIP Call cannot be justified by mere supposition of the possible ambient air quality impacts of an unidentified worst single source or small group of sources. Even if attainment problems were demonstrated for a small number of sources, that would not justify limiting the operational flexibility for all other sources that may not reasonably be anticipated to cause NAAQS violations during periods of startup, shutdown, or malfunction. The "overkill" in the Ohio SIP emission control obligations must be taken into account, for each of the six criteria pollutants, in evaluating the air quality significance of the malfunction accountability provisions in the Ohio SIP. Before U.S. EPA can find the Ohio SIP to be substantially inadequate to attain and maintain the NAAQS due to the malfunction accountability provisions, U.S. EPA must demonstrate NAAQS violations for each unit/pollutant combination.

"The Clean Air Act is a model of cooperative federalism." *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012). See also *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012); *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012); and *Alabama Environmental Council v. EPA*, 711 F.3d 1277, 2013 U.S. App. LEXIS 4598 (11th Cir. 2013). A cardinal principle embedded in the first section of the Clean Air Act (§ 101(a)(3)) for 50 years is that "air pollution control at its source is the primary responsibility of States and local governments." Similarly, § 107(a) of the Clean Air Act provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." The first decision of the Supreme Court interpreting the State and federal roles with regard to State implementation plans, *Train v. NRDC*, 421 U.S. 60, 79 (1975), held in no uncertain terms that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if ... the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air[.]" Just as "EPA's authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment" (*EME Homer City Generation* at 20), so too does EPA lack authority to dictate emission reductions beyond the point where in-State attainment, in addition to downwind State attainment, is achieved. U.S. EPA's SSM proposal conflicts with four decades of case law interpreting the division of State and federal authority and responsibility under the Clean Air Act.

In short, Ohio's malfunction accountability provisions are not "substantially inadequate" because they have not been shown to interfere with attainment or maintenance of the NAAQS in Ohio. Overriding Ohio's malfunction accountability provisions would be the antithesis of cooperative federalism, because U.S. EPA's SSM proposal would usurp the State prerogatives affirmed in § 101(a)(3) and 107(a) of the Clean Air Act.

U.S. EPA's Proposed Interpretation of the Definition of "Emission Limitation" Should Be Rejected Because It Would Lead to Absurd Results

Finally, U.S. EPA should reject its proposed interpretation of "emission limitation" in CAA § 302(k) because it would lead to absurd results. "[W]here a literal reading of a statutory term would lead to absurd results, the term simply has no meaning ... and is the proper subject of construction by EPA and the courts." *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994), quoted in *Coalition for Responsible Regulation v. EPA*, Case No. 09-1322, at 75 (D.C. Cir. June 26, 2012). As U.S. EPA said in its final rule adopting the Greenhouse Gas Tailoring Rule:

[U]nder the "absurd results" doctrine, the literal meaning of statutory requirements should not be considered to indicate congressional intent if that literal meaning would produce a result that is senseless

or that is otherwise inconsistent with – and especially one that undermines – underlying congressional purpose. In these cases, if congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent. If congressional intent is not clear, then an agency may select an interpretation that is reasonable under the statute.

75 Fed. Reg. 31,514, 31,517 (June 3, 2010). See also *United States v. Wilson*, 503 U. S. 329, 334 (1992), quoted in *McNeill v. U.S.*, 131 S.Ct. 2218 (2011) (“[A]bsurd results are to be avoided”); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (holding, “the intention of the drafters, rather than the strict language, controls” if “the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters”).

As discussed above, interpreting the word “continuous” in the Clean Air Act’s definition of “emission limitation” to prohibit SSM exemptions is inconsistent with congressional intent. Congress clearly had in mind a meaning of “continuous” opposite to “intermittent” in the context of the high profile, pre-1977 controversy over intermittent control systems pursued to prevent ambient air quality monitors from recording NAAQS exceedences during unfavorable meteorological conditions. Many SIPs approved and SIP revisions pending at the time of the 1977 Amendments (when the current § 302(k) definition of “emission limitation” was enacted) had startup, shutdown, and malfunction provisions. If Congress had tried in the 1977 Amendments to the Clean Air Act (in the midst of the Arab oil embargoes and natural gas curtailments) to prohibit these essential safety valves integral to the ambitious and costly SIP compliance obligations, there would have been a firestorm of political and economic opposition. Indeed, in the mid-1970s, shortly before the 1977 Amendments, U.S. EPA’s Administrator conceded that start-up, shutdown, and malfunction exceptions were *required* in Ohio’s SIP and refused to approve that SIP *unless* Ohio included such exceptions. See *Buckeye Power, Inc. v. EPA*, 525 F.2d 80, 81 (1975).

And, not surprisingly, interpreting § 302(k) to require the application of numeric emission limitations even during start-up, shutdown, maintenance, or malfunction periods would have several senseless results. First and foremost, it would effectively outlaw the operation of sources throughout the country, after (in some cases) forty years of legal operation under approved State Implementation Plans. The malfunction accountability provisions that U.S. EPA is proposing to find “substantially inadequate” grant Ohio EPA’s Administrator the power to authorize a source to continue operating “during the scheduled maintenance of air pollution control equipment,” “[i]n cases where a complete source shutdown may result in damage to the air pollution sources or is otherwise impossible or impractical” and where the director concludes “the situation justifies continued operation.” OAC 3745-15-06(A)(3) and (C). A finding that these provisions are “substantially inadequate” would put the sources that currently rely on these provisions in untenable positions. If shutting down during maintenance on their air pollution control equipment

would "result in damage to the air pollution sources," then those sources can either incur the costs to repair that damage or continue to operate and face claims for injunctive relief and penalties. And, if shutting down during air pollution control equipment maintenance is entirely "impossible or impractical," then the sources will have no choice but to continue operating and face potential liability. For such sources, U.S. EPA's position leaves them with no way of complying with Ohio's SIP short of shutting down for good. Turning previously law-abiding sources into automatic environmental scofflaws is an absurd result.

Second, U.S. EPA's position would be practically impossible to enforce. U.S. EPA's regulations for the approval and promulgation of implementation plans state that "Sources subject to plan provisions which do not specify a test procedure and sources subject to provisions promulgated by the Administrator will be tested by means of the appropriate procedures and methods prescribed in part 60 of this chapter unless otherwise specified in this part." 40 C.F.R. §52.12(c)(1). In most, if not all cases, the Ohio SIP requires sources to use U.S. EPA reference methods from 40 C.F.R. Part 60 to determine compliance. For example, OAC 3745-17-01(B)(12) defines "particulate emissions" as particulate matter "measurable by the applicable test methods in 40 C.F. R. Part 60, Appendix A." *See also, e.g.*, OAC 3745-75-02(E) (requiring the use of USEPA Methods 10 or 10B to determine compliance with the CO limits in that rule); OAC 3745-110-05(A) (requiring the use of USEPA Methods 7, 7a, 7c, 7d, or 7e (or other approved and applicable USEPA methods) to determine compliance with the NOx emission limits in OAC 3745-110-03). And, 40 C.F.R. Part 60 makes clear that performance tests applying U.S. EPA's reference test methods are to be conducted "under ... conditions ... based on representative performance of the affected facility." 40 C.F.R. 60.8(c). Importantly, the rules specify that SSM periods are not "representative":

Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.

Id. Ohio EPA's Engineering Guides offer the same advice. For over thirty years, Ohio EPA has instructed sources that "[t]he goal of any compliance testing is to accurately quantify the actual or controlled emission rate during operating conditions that realistically reflect the highest emission rate for the source. Such operating conditions would not include malfunctions, start-ups or shutdowns." Ohio EPA, Office of Air Pollution Control, Engineering Guide #17, at 1. If a reference test method must be conducted under representative conditions, however, and if SSM periods are not representative conditions, then it is impossible to determine compliance during SSM periods when a reference test method is required. And, while U.S. EPA's regulations provide for the use of "credible evidence" as an alternative means of determining compliance, that "credible evidence" must be "relevant to whether a source would have been in compliance with applicable requirements *if the appropriate performance or compliance test procedures or methods had been performed[.]*" 40 C.F.R. §52.12(c) (emphasis added). In other words, the other

"credible evidence" "would have to relate to the likely measurement of [emissions] that would be obtained by a [reference method] measurement." 62 Fed. Reg. 8314, 8316 (Feb. 24, 1997). U.S. EPA's rules, and Ohio EPA's guidance, establish that no proper measurement of emissions can be obtained during SSM periods using reference test methods. Thus, changing U.S. EPA's interpretation of "emission limitation" so as to require compliance with numerical limits at all times, even during SSM periods, would leave U.S. EPA (and others) without any way to determine the occurrence of, or demonstrate, exceedances during SSM periods. Alternatively, it would require U.S. EPA to develop some entirely new way of determining compliance with emission limitations that can be fairly applied during periods of unrepresentative operation. This is an absurd result.

To the extent that U.S. EPA is trying to interpret the word "continuous" in the definition of "emission limitation" in a manner that would disassociate numerical emission limits from their integrally intertwined compliance test methods, such an agenda is clearly unlawful, and arbitrary and capricious. Courts have held throughout the 43-year history of the Clean Air Act that changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself. *See, e.g., Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1304 (W.D.N.Y. 1979); *United States v. Zimmer Paper Products*, Case No. IP 88-194-C, 1989 U.S. Dist. LEXIS 16586 (S.D. Ind. Dec. 5, 1989); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1027 (D.C. Cir. 2000); *National Parks Conservation Assn. v. TVA*, 175 F. Supp. 2d 1071, 1079 (E.D. Tenn. 2001). U.S. EPA disavowed any such back-door scheme to make emission limits more stringent in its Credible Evidence rulemaking and defense of that rulemaking in the D.C. Circuit. Any attempt to use a "startup, shutdown, and malfunction" policy to effectuate a similar back-door scheme to make all SIP emission limitations more stringent would force Ohio and other States to engage in costly, contentious rulemakings to revise their SIPs. In those SIP revision rulemakings, the States would need to provide technical and legal justification – never before provided or subjected to public notice and comment – for increasing the stringency of all the emission limitations in the approved SIPs. Such a diversion of State resources – based on a new U.S. EPA "policy" and not on any facts or reliable scientific evidence – would be useless and expensive beyond reason, and at odds with the design of the Clean Air Act. This is an absurd result.

Third, U.S. EPA's position would make it harder to monitor and control emissions during SSM periods. EPA's proposed SIP Call would transfer discretion for determining the sufficiency of actions to avoid, manage, minimize, and correct emissions attributable to inevitable maintenance or malfunctions of air pollution control technologies or processes that emit regulated pollutants – discretion that is carefully circumscribed by objective rule-based criteria and transparently administered by expert State regulatory authorities – to U.S. EPA enforcement officials and Clean Air Act citizen suit plaintiffs, and ultimately to the federal Judicial branch. Such usurpation of State prerogatives, and transfer of Executive branch functions to the Judicial branch, would conflict with both the Clean Air Act's and the Constitution's assignment of powers and responsibilities, and would offend common sense. It would also make it more difficult for enforcement officials and citizen suit plaintiffs to detect emissions that are of environmental concern during SSM periods. Under Ohio's malfunction accountability provisions, sources that need to perform maintenance on their

air pollution control equipment, but cannot shut down while doing so (or cannot shut down without causing damage to the sources), are required to give advance notice of the scheduled maintenance to Ohio EPA. This advance notice informs Ohio EPA of the source, the expected length of the air pollution control maintenance outage, and “[t]he nature and estimated quantity of emissions of air contaminants which are likely to occur during the shutdown period[.]” OAC 3745-15-06(A)(3). Finding this provision substantially inadequate would leave Ohio EPA less informed, and hence less able to ensure that the emissions during that air pollution control maintenance outage will not “endanger or tend to endanger the health or safety of the public.” OAC 3745-15-06(C). A revised statutory interpretation that would weaken, not strengthen, the ability of State regulatory authorities to monitor air pollution is, again, an absurd result.

Fourth, U.S. EPA’s proposed elimination or revision of certain malfunction provisions in Ohio’s SIP would require Ohio EPA to undertake costly rulemaking to amend the relevant regulations, and also to undertake costly administrative procedures to revise tens of thousands of Title V and non-Title V operating permits that incorporate the malfunction provisions in question. Thrusting a costly unfunded mandate on the States – for action that is not demonstrated to be necessary in fact to prevent NAAQS nonattainment, at a time the States are stretched to their limits to implement new, more stringent NAAQS and an ever increasing number of other complex Clean Air Act requirements – would be an absurd result.

Fifth, if provisions that States adopt straight from federal rules can be deemed inadequate, like the Portland cement kiln SSM standards at issue here (which were adopted from a draft Federal Implementation Plan), EPA’s entire regulatory structure would become irrational and unworkable. States often adopt NSPS and NESHAP provisions containing SSM provisions into their SIPs. These NSPS and NESHAP standards often impose work practice standards during startups and shutdowns because the technology-based standards cannot be achieved during such periods. EPA’s new philosophy regarding continuous limits would make virtually all such NSPS or NESHAP limits impossible to meet during startups and shutdowns. This, again, is irrational and cannot stand.

Conclusion

The Ohio SIP provisions that U.S. EPA proposes to find “substantially inadequate” pursuant to CAA § 110(k)(5) do not meet that legal standard. Ohio’s SSM and malfunction accountability provisions are not “substantially inadequate” because they do not, when considered in conjunction with the other, overly conservative provisions of the Ohio SIP, interfere with the attainment or maintenance of the NAAQS. The SSM provisions for Portland cement plants are lawful, because the emission control requirements for such plants are either (i) not “emission limitations” or (ii) “emission limitations” that need not be imposed on a continuous basis. The malfunction accountability provisions are lawful, because their requirement that sources utilize “all feasible interim control measures” when conducting air pollution control maintenance ensures that sources are subject to

“continuous” emission limitations. And, U.S. EPA’s contrary interpretations of the statutory phrases “substantially inadequate” and “continuous” must be rejected because they are contrary to Congressional intent and would lead to multiple absurd results. For all of the reasons described above, the Ohio Chemistry Technology Council, the Ohio Chamber of Commerce, and the Ohio Manufacturers’ Association ask U.S. EPA to withdraw and reconsider its February 22, 2013 proposed actions.

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